

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

KEVIN BONNER,

Plaintiff,

v.

NORMANDY PARK, and DETECTIVE  
JOHN LIEVERO,

Defendants.

CASE NO. C07-962RSM

ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
RULE 26 AND 37 MOTION TO  
COMPEL DISCOVERY AND FOR  
SANCTIONS

This matter comes before the Court on defendants' Rule 26 and 37 Motion to Compel Discovery and for Sanctions. (Dkt. #17). Plaintiff Kevin Bonner ("Mr. Bonner") filed the instant lawsuit alleging that he was falsely arrested and imprisoned and subject to excessive force on April 25, 2005, in violation of 42 U.S.C. § 1983 and Washington State common law. Defendants Normandy Park and John Lievero (collectively "defendants") now move the Court for an Order compelling Mr. Bonner to respond to the following information: (1) to answer two Requests for Production ("RFP") regarding notes prepared by Mr. Bonner and reviewed by him in preparation of his November 29, 2007 deposition; (2) to answer Interrogatory No. 3 regarding financial stressors; (3) to answer two RFPs regarding checking account and tax records; (4) to answer two RFPs regarding the production of criminal defense attorney billing invoices as a part of special damages; (5) to answer two RFPs regarding attorney billings and payments for legal proceedings; and (6) to compel admissions as to the truth of a document

1 previously entered in a state municipal court. Defendants also seek an Order compelling Mr.  
2 Bonner to resume his deposition, and to provide an additional hour of deposition time beyond  
3 the seven hours permitted by the Rules. Lastly, defendants seek attorney's fees and sanctions.

4 Mr. Bonner disputes each argument raised by defendants, and also seeks attorney's  
5 fees. The Court notes that the parties have made a good-faith effort to resolve their discovery  
6 disputes pursuant to Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 37(a)(2)(B), with the  
7 exception of defendants' attempt to compel Mr. Bonner to resume his deposition.

8 Having reviewed defendants' motion, plaintiff's response, defendants' reply, the  
9 declarations and exhibits attached thereto, and the remainder of the record, the Court hereby  
10 finds and orders:

11 (1) Defendants' Rule 26 and 37 Motion to Compel Discovery and for Sanctions  
12 (Dkt. #17) is GRANTED IN PART and DENIED IN PART as follows:

13 a. RFPs regarding Mr. Bonner's notes: Mr. Bonner prepared notes on or around June  
14 6, 2005, following the events that gave rise to this lawsuit. Defendants argue that they are  
15 entitled to these notes because he testified in his deposition that he specifically did not prepare  
16 his notes for his attorney.<sup>1</sup> Furthermore, defendants argue that where a party relies on work  
17 product documentation to prepare to be deposed, opposing counsel is entitled to production  
18 of such documents. Mr. Bonner responds that defendants' characterization of Mr. Bonner's  
19 deposition is incorrect. Mr. Bonner further objects to the disclosure of the notes on the  
20 grounds of the attorney-client privilege.

21 At its most fundamental level, the attorney-client privilege extends to disclosures made  
22 by a client to his attorney during the course of representation. *See Fisher v. United States*,  
23 425 U.S. 391, 403, 96 S.Ct. 1569 (1976); *Upjohn Co. v. United States*, 449 U.S. 383, 389,  
24 101 S.Ct. 677 (1981); Fed. R. Evid. 501. Here, the applicability of the privilege plainly does  
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26 <sup>1</sup> Plaintiff retained Robert Hardy ("Mr. Hardy") to represent him in a separate criminal matter that  
27 was pending as a result of the events that gave rise to the instant case. The criminal matter has since been  
28 dismissed. (Dkt. #1, Plaintiff's Complaint, ¶ 2.12).

1 not apply as evidenced by Mr. Bonner's own deposition testimony. It provides in pertinent  
2 part:

3 Q: Were [the notes] originally prepared for your criminal defense attorney, Mr.  
4 Hardy?

5 A: No.

6 Q: Were any of the documents that you reviewed to prepare for the deposition  
7 today originally prepared by you for your criminal defense attorney, Mr.  
8 Hardy?

9 A: No.

10 \* \* \*

11 Q: And so, at the time you wrote the documents that you reviewed for your  
12 deposition today, you had no counsel; is that correct?

13 \* \* \*

14 A: *I don't know.*

15 (Dkt. #18, Dep. of Bonner, 13:14-20;14:19-25) (emphasis added).

16 Thus, the Court cannot find that Mr. Bonner is entitled to the attorney-client privilege  
17 given that Mr. Bonner has testified under oath that: (1) he did not prepare his notes for  
18 counsel; and (2) he was unsure whether he represented by counsel at the time he prepared  
19 such notes. The notes simply were not communications made to an attorney. Moreover,  
20 defendants are correct in arguing that generally speaking, disclosure of communications or  
21 information that otherwise would be at least presumptively protected by a privilege or the  
22 work product doctrine are discoverable if a witness reviews such communications or  
23 information in preparation of his deposition. *See, e.g., Intermedics, Inc. v. Ventritex, Inc.*,  
24 139 F.R.D. 384, 386, n.1 (N.D. Cal. 1991) (holding that all communications made from  
25 counsel to a testifying expert that relate to the subjects about which the expert will testify are  
26 discoverable); *see also Wheeling-Pittsburgh Steel Corp. v. Underwriters Laboratories, Inc.*,  
27 81 F.R.D. 8, 9-10 (N.D. Ill. 1978) (finding that a plaintiff waived the attorney-client privilege  
28 as to certain documents by allowing their use for the purpose of refreshing recollection of  
plaintiff's former employee immediately prior to his deposition).

In any event, Fed. R. Civ. P. 33(b)(4) provides that "[t]he grounds for objecting to an  
interrogatory must be stated with specificity. Any ground *not stated in a timely objection is*  
*waived* unless the court, for good cause, excuses the failure." *Id.* (emphasis added). Here,  
the relevant RFP provides:

1 Pursuant to Fed. R. Civ. [P]. 34, please produce a copy of any journal entries or notes  
2 written by Plaintiff relating to Plaintiff's April 25, 2005 arrest in [your] or your  
attorney's possession.

3 Response: Any responsive documents were provided to Defendant with Plaintiff's  
Initial Disclosures.

4 (Dkt. #18, Ex. G at 44).

5 Therefore the record is equally clear that Mr. Bonner did not assert the attorney-client  
6 privilege with respect to this RFP. Nor has Mr. Bonner shown good cause to excuse his  
7 failure to disclose. Accordingly, defendants' motion to compel the discovery of these notes  
8 shall be GRANTED.

9 b. Interrogatory No. 3 regarding financial stressors: Defendants argue that they are  
10 entitled to discover sources of financial stress claimed by Mr. Bonner. Specifically,  
11 defendants move the Court to compel Mr. Bonner to respond to its Interrogatory No. 3 which  
12 asks Mr. Bonner to produce the total amount of money he and his wife paid to support their  
13 daughter in the three years preceding April 25, 2005. Mr. Bonner objects to the discovery on  
14 the grounds that it is a violation of privacy, irrelevant, and unlikely to lead to the discovery of  
15 admissible evidence. The Court agrees. While parties are generally entitled to all relevant  
16 information, *see* Fed. R. Civ. P. 26(b)(1), a court "must limit the frequency or extent of  
17 discovery . . . if it determines that . . . the burden or expense of the proposed discovery  
18 outweighs its likely benefits, considering the needs of the case, the amount in controversy, the  
19 parties' resources, the importance of the issues at stake in the action, and the importance of  
20 the discovery in resolving the issues." Fed. R. Civ. P. 26(b)(2)(C)(iii).

21 Here, Mr. Bonner is asserting emotional damages related to the incident giving rise to  
22 the lawsuit. And while he has claimed in his deposition that other financial stressors were  
23 present in his life, including the responsibility to care for his daughter, the precise amount of  
24 how much he paid to care for his daughter for three years preceding April 25, 2005 is too far  
25 removed from the actual merits of this case. In addition, the Court notes that it has permitted  
26 defendants to conduct an IME of Mr. Bonner regarding the emotional distress he is suffering.  
27 (*See* Dkt. #36). Therefore the IME, coupled with the financial records Mr. Bonner has  
28 already provided to defendants, sufficiently provides them with the information needed to

1 defend against Mr. Bonner's damages claim of emotional distress. Accordingly, defendants'  
2 motion to compel a response to Interrogatory No. 3 is DENIED.

3 c. RFPs regarding Mr. Bonner's Checking Account and Tax Records: Defendants  
4 request financial information related to Mr. Bonner's checking and tax records from the years  
5 2004 through 2007. For the same reasons mentioned above with respect to Mr. Bonner's  
6 financial records related to his daughter, the Court finds that this information is too far  
7 removed from the merits of the case. Accordingly, defendants' motion to compel Mr.  
8 Bonner's checking account and tax records is DENIED.

9 d. RFPs regarding Mr. Bonner's Criminal Defense Attorney Bills: Defendants move  
10 to compel the production of the criminal defense attorney bills on the grounds that Mr.  
11 Bonner has made a claim to recoup attorney's fees incurred in defending the criminal charges  
12 filed against him. (Dkt. #1, Plaintiff's Complaint, ¶ 4.4). Mr. Bonner argues that the billings  
13 were protected by the attorney-client privilege. In addition, Mr. Bonner argues that he has  
14 already submitted copies of checks made payable to his criminal defense attorney.

15 It is well established that the amount of the fee an attorney charges his client is  
16 generally unprotected from disclosure by the attorney-client privilege. *United States v. Bauer*,  
17 132 F.3d 504, 509 (9th Cir. 1997); *United States v. Carrillo*, 16 F.3d 1046, 1050 (9th Cir.  
18 1994). Only bills "which also reveal the motive of the client in seeking representation,  
19 litigation strategy, or the specific nature of the services provided . . . fall within the privilege."  
20 *Clarke v. American Commerce Nat. Bank*, 974 F.2d 127, 129 (9th Cir. 1992). The burden of  
21 establishing the privilege rests with the party asserting the privilege. *Id.*

22 In the instant case, because Mr. Bonner is seeking to recoup the costs associated with  
23 defending himself in the underlying criminal proceeding, defendants are correct in asserting  
24 that they are entitled to a copy of the bills Mr. Bonner's attorney sent to him. Defendants  
25 have the right to examine the extent to which they may be financially responsible to Mr.  
26 Bonner when Mr. Bonner is making a specific claim to recover attorney's fees. Furthermore,  
27 such bills are not protected by the attorney-client privilege, and Mr. Bonner has failed to show  
28 why the privilege would apply in his case. Accordingly, defendants' motion to compel copies

1 of Mr. Bonner's criminal defense attorney bills is GRANTED.

2 e. RFPs regarding attorney billings and payments for legal proceedings: Defendants  
3 move to compel the production of "attorney billings and payments for legal proceedings  
4 pending during the timeframe in question." (Dkt. #17 at 1). However, defendants fail to  
5 differentiate within the body of its motion how this request differs from its request to obtain  
6 Mr. Bonner's criminal defense attorney bills discussed above. Therefore to the extent that  
7 defendants seek an Order from the Court regarding this specific request, the motion is  
8 DENIED.

9 f. Request for Admissions: On December 6, 2005, Mr. Bonner signed a "Stipulated  
10 Order of Continuance" in the Des Moines Municipal Court for the city of Normandy Park.  
11 The stipulation states:

12 *In the event the court finds cause to revoke the stay of proceedings*, [Mr. Bonner]  
13 stipulates and agrees to the following facts: that at 1:37PM on April 25, 2005 with  
14 permission, he knowingly entered the Normandy Park Police Station; That on April 25  
15 at about 1:40pm [Mr. Bonner] was ordered to leave the Police Station; That the order  
to leave by Police Officers was a lawful order; That when [Mr. Bonner] was told to  
leave he remained in the police station. [Mr. Bonner] stipulates and agrees that the  
facts outlined above are sufficient to convict [him] of the charged crime(s).

16 (Dkt. #26, Decl. of Needle, Ex. C) (emphasis added).

17 Based on this stipulation, defendants propounded a Request for Admissions upon Mr.  
18 Bonner, attempting to have Mr. Bonner admit to the facts mentioned in the stipulation. (Dkt.  
19 #18, Ex. J). Mr. Bonner denied defendants' requests, with the exception of defendants'  
20 request that Mr. Bonner admit that the stipulation was a true and correct copy that he signed.  
21 (*Id.* at 61). Defendants now request that the Court compel Mr. Bonner to admit to the  
22 remainder of its request for admissions.

23 Given the plain language of the stipulation, however, the Court finds that Mr. Bonner  
24 does not to have to admit to such facts. The phrase "[i]n the event the court finds cause to  
25 revoke the stay of proceedings" undoubtedly modifies the entire paragraph of the stipulation.  
26 Therefore whether Mr. Bonner previously stipulated to such facts is conditioned upon  
27 whether the court revoked the stay of proceedings, which it did not do based upon the fact  
28 that the criminal charges were dropped against Mr. Bonner. Defendants do not dispute this

1 fact. Accordingly, defendants' motion to compel Mr. Bonner to admit to certain facts in  
2 defendants' request for admissions is DENIED.

3 g. Mr. Bonner's deposition: Defendants argue that the Court should compel Mr.  
4 Bonner to resume his deposition because it was unnecessarily cut short, and to provide an  
5 additional hour of deposition time beyond the seven permitted by the Rules. However, as  
6 mentioned above, the Court notes that defendants did not comply with its meet-and-confer  
7 obligations with respect to this discovery dispute. For example, defendants' counsel's letter  
8 to Mr. Bonner's counsel states that "[i]n our view, the following six (6) matters are still  
9 outstanding and a matter of dispute between the parties." (Dkt. #18, Ex. U at 157). But the  
10 list does not contain a reference to defendants seeking additional deposition testimony from  
11 Mr. Bonner. As the Court has made clear in a previous Order instructing the parties to  
12 comply with its meet-and-confer obligations (*see* Dkt. #35), the Court does not take this  
13 obligation lightly. Accordingly, defendants' motion to compel further deposition testimony of  
14 Mr. Bonner is DENIED.

15 h. Attorney's fees: Both parties move the Court for an award of attorney's fees.  
16 Pursuant to Fed. R. Civ. P. 37(a)(4)(A) and (B), if a motion to compel is granted or denied,  
17 the court shall require the losing party to pay the other the reasonable expenses, including  
18 attorney's fees, incurred in either bringing the motion or defending the motion. *See id.*  
19 However, the Rules make it clear that attorney's fees are not justified if there are "other  
20 circumstances [that] make an award of expenses unjust." *Id.* District courts generally have  
21 broad discretion to interpret and apply their local rules. *See Delange v. Dutra Const. Co.,*  
22 *Inc.*, 183 F.3d 916, 919, n.2 (9th Cir. 1999) (citation omitted).

23 Here, both parties have been equally dilatory for the discovery disputes that have  
24 necessitated the Court's involvement. The record reflects that counsel have been exceedingly  
25 adversarial as evidenced through their conduct in depositions, correspondence, and in the  
26 motions filed with the Court. Under these circumstances, neither party is entitled to  
27 attorney's fees. Accordingly, the request for attorney's fees is DENIED.

28 (2) With respect to the portions of defendants' Motion to Compel that the Court has

1 granted, plaintiff is directed to comply with defendants' discovery requests no later than  
2 twenty-one (21) days from the date of this Order.

3 (3) The Clerk is directed to forward a copy of this Order to all counsel of record.

4  
5 DATED this 14<sup>th</sup> day of February, 2008.

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7 RICARDO S. MARTINEZ  
8 UNITED STATES DISTRICT JUDGE  
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